No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAI'I, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NEW YORK UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae New York University ("NYU" or the "University") is an institution of higher learning headquartered in New York City, with campuses on nearly every continent. A critical component of NYU's global mission is to create an environment that fosters achievement borne of the free exchange of ideas and information. NYU advances that mission by welcoming and engaging students and scholars from the broadest range of backgrounds and nationalities around the world.

As a global university centered in New York City—one of the world's most internationally diverse cities—NYU has a vital interest in the proper administration, within constitutional limits, of the immigration laws of the United States. NYU is deeply concerned that Proclamation 9645 issued by the President on September 27, 2017, titled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" (the "Proclamation"), like its predecessor Executive Orders, exceeds those limits. If allowed to stand, it would impair unique educational opportunities that NYU is otherwise

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1. The parties consent to the filing of this brief, which authorizes NYU to file it pursuant to Sup. Ct. R. 37. Petitioners have provided blanket consent for the filing of amicus curiae briefs, and Respondents have provided their written consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party, or counsel for a party, contributed money intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its constituents or its counsel contributed money intended to fund the preparation or submission of the brief.

able to provide, inflicting harm on the University, on its constituents and on the community at large. This Court has implicitly recognized the importance of relationships between entities like NYU and foreign nationals whom the Proclamation—like the Executive Orders before it—seeks to bar. *See Trump v. Int'l Refugee Assistance Project ("IRAP I")*, 137 S. Ct. 2080, 2089 (2017) ("An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded.").

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Thousands of prospective students apply to NYU every year, seeking the opportunity to study at one of the most internationally diverse universities in the world. At the core of NYU's institutional mission are the twin aims of providing an exceptional academic experience for its students and fostering world-class international scholarship. NYU has invested significant resources in developing an environment in which its diverse student body and faculty can thrive, for the benefit of the academic community, the United States, and the world. Implementation of the Proclamation would significantly undermine these efforts.

By obstructing the entry of international students, faculty and other scholars into the United States based solely on their having come from one of the Muslim-majority countries singled out for adverse treatment in the Proclamation—without any reason to believe that these individuals are involved in any terrorist activity—the Proclamation gratuitously and unlawfully encumbers

NYU's ability to conduct its many international programs, which rely on input from faculty and students from the affected countries. The Proclamation also impairs NYU's ability to transmit its strongly-held values abroad, and obstructs its ability to provide to all of its students the educational benefits that flow from a fully diverse student body and faculty. For these reasons, among others, this Court should find that the Proclamation exceeds the President's statutory authority under the INA and violates the Constitution, and affirm the preliminary injunction granted below.

ARGUMENT

I. A Diverse International Community is Critical to NYU's Identity and Mission.

NYU is a "Global Network University," with campuses around the world, including in Africa, Asia, Europe, North America, and South America.[2] These campuses offer all NYU students a range of multi-disciplinary opportunities for research, teaching and scholarly collaboration. In addition to developing its own campuses, NYU has partnered with numerous schools worldwide both to create educational opportunities for international students and scholars[3] and to expose its domestic students to the vast

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2. *See The Global Network*, NYU, https://www.nyu.edu/faculty/governance-policies-and-procedures/faculty-handbook/the-university/organization-and-administration/the-global-network.html.

3. *See Global Academic Partnerships and Affiliations*, NYU, https://www.nyu.edu/faculty/global-academic-partnerships-and-affiliations.html (describing global partnerships and affiliations

wealth of experience and knowledge that can be gained by traveling, researching and studying abroad.[4]

Attracting to the United States international students and scholars from a wide variety of backgrounds is intrinsic to NYU's success as an educational institution. To that end, NYU has made it a priority to "embrace diversity among faculty, staff and students to ensure a wide range of perspectives, including international perspectives, in the educational experience."[5] Its efforts have been highly successful—in 2016-2017, NYU hosted more international students and scholars than any other university in the United States—more than 17,000 international students and more than 1,220 international scholars[6] constituting more than a third of NYU's graduate student population,

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with schools for the humanities, business, medicine, sociology, anthropology, and the arts, located in Accra, Berlin, Buenos Aires, Florence, London, Madrid, Paris, Prague, Sydney, Tel Aviv, and Washington D.C.); *see also Update on Faculty Engagement and Academic Development at the Global Sites (6/11/15 Memo)*, NYU (June 11, 2015), https://www.nyu.edu/faculty/global-academic-partnerships-and-affiliations/memos/faculty-engagement-june-2015.html (detailing the growth of new collaborative programs with faculty, students and departments at partnership and affiliate schools).

4. *See, e.g., NYU International Exchange Program*, NYU, https://www.nyu.edu/academics/studying-abroad/exchange/internationalexchange.html; *Stern IBEX (International Business Exchange)*, NYU, https://www.nyu.edu/academics/studying-abroad/exchange/stern-ibex-international-business-exchange.html.

5. NYU Mission Statement, www.nyu.edu/about.

6. *Annual Report: September 1, 2016 - August 31, 2017*, NYU Office of Global Services, https://www.nyu.edu/content/dam/nyu/globalServices/documents/annualreport/annualReport2016-17.pdf.

and nearly a fifth of its undergraduate population. The most creative, talented, and industrious members of communities all over the world have at one time called NYU home.[7]

NYU's presence in New York City has itself played an integral role in the University's ability to achieve its international mission, proudly "tak[ing] its name and spirit from one of the busiest, most diverse and dynamic cities of all."[8] Millions of immigrants have come to New York as the first step toward making a life in the United States[9] believing that the Statue of Liberty in fact welcomes the "huddled masses yearning to breathe free . . . ."[10] New York is home to millions of foreign-born residents—more than

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7. Many NYU alumni from foreign countries have gone on to become leaders in their communities. To take but a few examples, NYU alumni Shimon Peres, the ninth President of Israel, and former Egyptian vice president Mohammed Mustafa ElBaradei, both won the Nobel Peace Prize for their contributions to the region targeted by the Proclamation. Working with fellow NYU School of Medicine alumnus Jonas Salk, Albert Sabin developed oral polio vaccines that played a key role in substantially eradicating the disease. More recently, Eric Richard Kandel, who also attended NYU's School of Medicine, was awarded a Nobel Prize in Physiology or Medicine for discoveries that paved the way to the modern understanding of memory formation.

8. NYU Mission Statement, www.nyu.edu/about.

9. From 1892 to 1954 alone, over twelve million immigrants came to the United States through Ellis Island. *See* Ellis Island History, www.libertyellisfoundation.org/ellis-island-history.

10. Emma Lazarus, *The New Colossus*, Liberty State Park (1883), http://www.libertystatepark.com/emma.htm (last accessed Mar. 27, 2018).

a third of the City's population.[11] The City has long served as a hub of international commerce, cultural exchange and diplomacy. Its international influences are woven into the fabric of everyday life experienced by NYU's students and scholars[12] and its spirit infuses and amplifies NYU's culture of embracing diversity.

NYU's mission and values are embodied in the words of its current president, Dr. Andrew Hamilton, himself an immigrant. In a letter to the NYU community addressing the January 27, 2017 Executive Order that preceded the Proclamation now at issue in this case, Dr. Hamilton articulated the importance of free movement across borders in pursuit of scholarship and the harm arising from its unwarranted obstruction:

> As a scientist who studied and worked in four countries before becoming a citizen of the U.S.,

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11. Thomas P. DiNapoli, *The Role of Immigrants in the New York City Economy*, New York State Comptroller Report 7-2016 (Nov. 2015), https://osc.state.ny.us/osdc/rpt7-2016.pdf ("Nearly three-quarters of the 4.4 million immigrants in New York State live in New York City . . . .").

12. *Students Share International Experiences at Global Engagement Symposium*, NYU Liberal Studies (Mar. 20, 2015), http://liberalstudies.nyu.edu/content/nyu-as/liberalstudies/news-events/students-share-international-experiences-at-global-engagement-sy.html ("[Students] presented on experiences that included installing a solar electricity system in a Nicaraguan village, independent research into NYU London's history as the headquarters of a musicians' club, and writing a policy report on asylum seekers in Tel Aviv.") (One student commented: "One of the main reasons I decided to study at NYU was the opportunity for global experiences.").

> I know how important it is to be able to move across borders in peaceful pursuit of one's scholarship. I know, too, more than most given my background and my field, how much goodwill the U.S. earns for itself through the openness of its education system and how widely those who study here can spread American values. And I know, as well, that these developments are not just a matter of disrupted educational plans or lost opportunities or even damage to the academic enterprise; beyond all that, this order harms one of the most admired and cherished of American principles–religious non-discrimination itself.[13]

II. The Proclamation Significantly Harms NYU and Its Constituents.

By indiscriminately targeting individuals from the Muslim-majority countries of Iran, Libya, Somalia, Chad, Syria and Yemen without any basis to believe that such individuals pose the slightest threat to the national security of the United States, the Proclamation improperly compromises the diversity that is central to NYU's identity and mission.[14] Approximately 120 NYU students

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13. Letter from Dr. Andrew Hamilton to NYU Community (Jan. 29, 2017), http://www.nyu.edu/about/leadership-university-administration/office-of-the-president/communications/the-recent-executive-order-on-immigration.html.

14. The Proclamation also imposes travel restrictions on nationals from Venezuela and North Korea. Proclamation § 1(g). Those restrictions are not covered by Respondents' challenge to the Proclamation.

and ten scholars at the New York City campus alone come from the six Muslim-majority countries specified in the Proclamation. Many others from those countries would be discouraged or prevented by the Proclamation from joining them at NYU.

Courts have long emphasized the importance of promoting diversity and freedom in educational environments, recognizing that, due to the classroom's vital role as a "marketplace of ideas," constitutional protections are "nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citation omitted). "The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Id.* (internal citation and quotation marks omitted).

Diversity similarly "helps to break down racial stereotypes, and enables [students] to better understand" those with different backgrounds. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (alteration in original). As a result, diversity helps impart the "skills needed in today's increasingly global marketplace" by "expos[ing] [students] to widely diverse people, cultures, ideas, and viewpoints." *Id.*; *see also Keyishian*, 385 U.S. at 603. Recognizing these benefits, the Supreme Court has held that the Constitution protects a school's "right to select those students who will contribute the most to the 'robust exchange of ideas . . . .'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978); *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (recognizing a school's ability to assert harm on behalf of its students, including harm to the university's ability

to accomplish its global mission); *see also Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 308 (2013) (recognizing compelling governmental interest in "the educational benefits that flow from a diverse student body").

By its very nature and goals, the Proclamation threatens that constitutionally protected diversity. *See Fisher*, 570 U.S. at 308; *Grutter*, 539 U.S. at 328 (observing that a school's "educational judgment that such diversity is essential to its educational mission is one to which we defer"); *Bakke*, 438 U.S. at 313; *see also Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (quoting 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948, at 440 (1973))).

The harm that flows from the Proclamation is in any case manifest. By targeting the populations of Muslim-majority nations for exclusion from the United States, the Proclamation hinders NYU's efforts to expose international students and scholars to a broad array of ideas and influences. This cross-cultural exchange buttresses key democratic traditions, such as free speech, a free press,[15] free and fair elections,

15. Indeed, many NYU graduates of the Near Eastern Studies program have gone on to be respected journalists, helping shape the thoughts for millions of readers about life and culture in the affected regions. Jared Malsin, who graduated from NYU's Near Eastern Studies in 2010, is *TIME* magazine's Middle East bureau chief, and former West Bank and Gaza Palestinian news agency Ma'an chief English editor. *See About – Jared Malsin*, http://jaredmalsin.com/about.html. Habib Battah, who graduated

and freedom of assembly.[16] By fostering a culture of international exchange and dialogue, rather than fear and hatred, NYU's international programs thus combat radicalization.[17] Reducing this cross-cultural exchange will deprive NYU of opportunities to share those key democratic traditions with students from abroad.[18] And in

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from NYU's Near Eastern Studies and Global Journalism program in 2010, is a prominent journalist in *Al Jazeera* covering terrorism in the Middle East among other events. *See* Habib Battah Profile, Al Jazeera, http://www.aljazeera.com/profile/habib-battah.html.

16. *See, e.g., Security Council, Unanimously Adopting Resolution 2250 (2015), Urges Member States to Increase Representation of Youth in Decision-Making at All Levels*, United Nations, Meetings Coverage and Press Releases, https://www.un.org/press/en/2015/sc12149.doc.htm (highlighting the need for "quality education for peace that equips youth with the ability to engage constructively in civic structures and inclusive political processes").

17. *See, e.g., Preventing Violent Extremism Through Promoting Inclusive Development, Tolerance and Respect for Diversity*, United Nations Development Programme 11 (2016) (identifying as one strategy to prevent violent extremism "[p]romoting respect for human rights, diversity and a culture of global citizenship in schools and universities"); *see also* Marta Mikilikowska, *Development of anti-immigrant attitudes in adolescence: The role of parents, peers, intergroup friendships, and empathy*, British Journal of Psychology (2017), http://onlinelibrary.wiley.com/doi/10.1111/bjop.12236/abstract (showing that adolescents with immigrant friends are "less affected by parents and peers' prejudice than youth without immigrant friends").

18. *See, e.g., Study Away in the US and Around the World*, Studying Abroad, NYU, https://www.nyu.edu/academics/studying-abroad.html (video testimonials of NYU students studying abroad) ("Regardless of where you go, you're going to experience, you know, a beautiful city and a beautiful place,

doing so, the Proclamation will diminish the global reach of American universities and risk robbing the nation, and the world, of their potential contributions.

Beyond its impact on the NYU community's ability to disseminate important shared values, the Proclamation threatens NYU's own diverse international community, harming the University's current and prospective students, scholars, and faculty. In addition to the day-to-day cultural exchange that occurs at a diverse university, NYU has many programs that facilitate the understanding of other cultures, such as the Hagop Kevorkian Center ("the Center"), which focuses on Near Eastern studies and was created "to foster the interdisciplinary study of the modern and contemporary Middle East and to enhance public understanding of the region."[19] To achieve this goal, it hosts events exploring topics such as "current events and policy issues relating to the Middle East,"[20] some of which include discussions relating specifically to the countries affected by the Proclamation.[21] The Center

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you are going to meet new people, you are going to have new experiences and opportunities, you are going to grow personally, you are going to grow academically, and you're going to come back a better person.").

19. *About*, Hagop Kevorkian Center for Near Eastern Studies, NYU, http://as.nyu.edu/neareaststudies/about.html.

20. *Id.*

21. *See* Events Listing, Hagop Kevorkian Center for Near Eastern Studies, NYU, http://as.nyu.edu/neareaststudies/events.html. For example, a discussion about the Muslim Brotherhood and the Politics of Reurbanization is planned for April 12, 2018. *See Notes from Who's Who: The Muslim Brotherhood and the Politics of Rurbanization*, NYU, http://as.nyu.edu/neareaststudies/events/spring-2018/the-muslim-brotherhood-and-the-politics-of-

also collaborates with "nearly 100 teachers from public and private schools across the New York metropolitan area to participate in Center-sponsored workshops on the Middle East," which allow Center-affiliated faculty to "share expertise on the Middle East with journalists and government agencies on a regular basis and discuss current events and policy issues at university and community events."[22] These programs are vital to public awareness, which is crucial to NYU's ability to serve as an educational institution "fitting for all and graciously open[] to all."[23]

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rurbanization.html. A lecture discussing how to theorize about the influence of ISIS and other radical Islamist groups is scheduled to be led by the Chair of the International History Department at the Graduate Institute of International and Development Studies in Geneva, occurred on March 29, 2018. *See Reading ISIS*, NYU, http://as.nyu.edu/neareaststudies/events/spring-2018/a-theory-of-isis---political-violence-and-the-transformation-of-.html. A talk about gendered reasoning in Iranian metaphysics will occur on April 19, 2018. *See The Iranian Metaphysicals: Spiritual Empiricism and the Gender of Reason*, NYU, http://as.nyu.edu/neareaststudies/events/spring-2018/the-iranian-metaphysicals--spiritual-empiricism-and-the-gender-o.html. A discussion about religious socio-historical processes that have influenced Iranian politics will take place on April 27, 2018. *See God and Man in Tehran*, NYU, http://as.nyu.edu/neareaststudies/events/spring-2018/god-and-man-in-tehran.html. An International Conference concerning Latin American-Middle Eastern ties is planned for April 27, 2018. *The Latin East/New Perspectives on Latin-America-Middle East Ties*, NYU, http://as.nyu.edu/neareaststudies/events/spring-2018/save-the-date--the-latin-east--an-international-conference.html.

22. *See About*, Hagop Kevorkian Center for Near Eastern Studies, NYU, http://as.nyu.edu/neareaststudies/about.html.

23. *See* NYU Mission Statement, www.nyu.edu/about.

From the joint master's degrees offered by the Center to the graduate programs offered by the Middle Eastern and Islamic Studies program, the value of NYU's educational opportunities is substantially predicated on the quality and diversity of its faculty and students. The Proclamation interferes with numerous on-campus programs like these, which are central to creating an environment of intellectual and cultural exchange, and thus heightened international awareness and understanding, at a time when such understanding is more important than ever.[24]

Finally, all students suffer when the diversity of ideas and backgrounds to which they are exposed is diminished. *See Fisher*, 570 U.S. at 308. Unchecked, the Proclamation has a direct and immediate impact on the large number of international students and scholars who wish to become affiliated with NYU or to participate in NYU academic conferences in their fields. Prospective students who have yet to enroll will be delayed or entirely prevented from beginning their academic careers.

The Proclamation denies students and scholars of vast untapped potential the success of which they are capable, harming them, the NYU community, and ultimately

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24. *See, e.g.*, Nassir Abdulaziz Al Nasser (High Representative for United Nations Alliance of Civilizations), *UNOAC | Remarks |Parliamentary Assembly of the Mediterranean* (Feb. 23, 2017), https://www.unaoc.org/2017/02/remarks-11th-plenary-session-parliamentary-assembly-of-the-mediterranean/ (commenting on the rise "of violence and xenophobia against minorities" and remarking that "inclusiveness has become a pre-requisite for peaceful society" when it comes to "migration laws," and that "[p]romoting and strengthening dialogue is an essential tool to prevent and defeat violent and extremist ideologies").

the world as a whole. For example, Shadi Heidarifar, a prospective graduate student who was accepted to schools worldwide but wanted to study in the United States, was not able to attend classes at NYU with worldwide leaders in her field.[25] Ms. Heidarifar has written that because of the January 27, 2017 Executive Order that preceded the Proclamation, her "entire future [was] destroyed in one second."[26] After saving money for the application fees "that a whole family could live [on] for a month," Ms. Heidarifar's dreams of studying at NYU were shattered.[27] Ms. Heidarifar is now enrolled at the University of Western Ontario, in Canada.

Although the Proclamation in its present iteration does not seek to suspend the entry of Iranian nationals under valid student and exchange visitor visas, similarly situated prospective students from the other countries covered by the Proclamation remain very much at risk of having their academic futures eradicated in an instant, and the NYU community is at risk of losing their unique perspectives and contributions to the University community. NYU's Brennan Center for Justice has noted this issue in connection with litigation challenging the

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25. *See* Samantha Michaels, *I'm an Iranian Woman Whose Dream Is to Study in America. Here's My Message for Trump.*, Mother Jones (Jan. 29, 2017), http://www.motherjones.com/politics/2017/01/iranian-student-trump-immigration ("We Iranian students strongly believe that diversity in ethnicity, race, religion, and color is one of the greatest strengths of the United States. And Trump's Muslim ban will destroy this.").

26. Thomas Erdbrink, *'How do I Get Back Home?' Iranians Turned Away from Flights to U.S.*, N.Y. Times (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/world/asia/how-do-i-get-back-home-iranians-turned-away-from-flights-to-us.html.

27. *Id.*

validity of the Proclamation as it relates to individuals, including one plaintiff's sister who had been accepted at Ohio State University, but who would not be able to pursue her academic studies should the Proclamation go into effect.[28] As Michael Price, a Brennan Center Senior Counsel, noted, the affected student could have been an NYU student, and that as a result of the Proclamation, "NYU will be deprived of the chance to have students from diverse populations and . . . Muslim students from the targeted countries," which "is a loss for everybody, for the university, and those potential students."[29] Thus, as a direct result of the Proclamation, universities like NYU will be deprived of diverse, capable students who have the potential to contribute to the universities they attend and the world as a whole.[30]

An integral part of the "business of a university [is] to provide that atmosphere which is most conducive to

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28. *See* Amy Rhee, *Brennan Center Sues Trump*, Washington Square News (Oct. 16, 2017), https://www.nyunews.com/2017/10/16/brennan-center-sues-trump/. The litigation filed by the Brennan Center is one of the cases covered by the Fourth Circuit's opinion in *Int'l Refugee Assistance Project v. Trump*, No. 17-2231.

29. *Id.*

30. Sana Malik, *'I'm accepted here.' Meet 4 students choosing Canada post Brexit and Trump*, CBC/Radio-Canada (June 15, 2017) http://www.cbc.ca/2017/i-m-accepted-here-meet-4-students-choosing-canada-post-brexit-and-trump-1.4158965 ("The travel ban made me feel I would not get a visa for the U.S. on time. Instead, I will start my MA at the University of Western Ontario in September . . . . I hope every nation and government understands that people in the six nations and Iran are not involved in terrorism. We are not a threat to the national security of any country.").

speculation, experiment and creation." *Bakke*, 438 U.S. at 305 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in judgment)). To preserve for NYU and its students and scholars the constitutionally protected benefits of diversity and the free exchange of ideas, and to eliminate the discriminatory exclusion from the United States of persons from Muslim-majority countries, this Court should affirm the decisions of the court below.

III. The Proclamation Has the Same Unlawful Policy Outcomes as Its Predecessors, In Violation of the Constitution and the Immigration and Nationality Act.

The Proclamation cites the findings of the "worldwide review" conducted by Executive Order 13780, the Proclamation's immediate predecessor, as justification for "impos[ing] certain conditional restrictions and limitations" on Chad, Iran, Libya, Syria, Yemen, and Somalia.[31] The Proclamation made various changes to the practices to be implemented under its predecessors, including adding Chad to, and removing Iraq and Sudan from, the list of countries whose nationals are subject to its suspension of unrestricted entry.[32] But it nonetheless suffers from many of the same defects as its predecessors, and is animated by the same unlawful, discriminatory intent.[33]

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31. Proclamation Preamble.

32. *See id.* § 2.

33. The Proclamation also contains an additional flaw, in that it now purports to suspend unrestricted entry by nationals of the Muslim-majority countries indefinitely, rather than for an identified, limited time period.

A. The Proclamation Violates the Establishment Clause.

Because it discriminates against individuals based on their religion and reflects a clear animus towards Muslims, the Proclamation, like its predecessor Executive Orders, violates the Establishment Clause of the Constitution. The "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005) (considering the "historical context" of the government act and the "specific sequence of events leading to [its] passage") (internal citation omitted).[34]

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34. For similar reasons, the Proclamation violates the Constitution's Equal Protection Clause. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the Fourteenth Amendment's equal protection clause to the federal government through the Fifth Amendment). Discrimination against a protected class on the basis of overt animus is the most obvious and fundamental abuse of government authority against which the Equal Protection Clause was created to protect. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified."). As such, classifications based on religion or national origin are scrutinized to the highest degree. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (national origin); *Larson*, 456 U.S. at 244 (religion). A law may fail to withstand scrutiny even if discrimination is not "the sole purpose of the challenged action, but only that it was a 'motivating factor.'" *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (internal citation omitted). "[T]he Religion Clauses . . . and the Equal Protection Clause as applied to religion . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Hassan v. City of New York*, 804 F.3d 277, 290 n.2 (3d Cir. 2015) (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*,

The administration would have the Court apply the highly deferential standard articulated in *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), and *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015), that only a "facially legitimate and bona fide reason" need be offered to justify certain federal immigration policies. *Mandel*, 408 U.S. at 770. Application of that standard was rejected by the Ninth Circuit in its decision concerning the second Executive Order.[35] *See Hawai'i v. Trump ("Hawai'i I")*, 859 F.3d 741, 769 n.9 (9th Cir. 2017).

Even assuming the *Mandel* standard did apply here, it would not foreclose judicial inquiry into improper purpose. Though deferential, *Mandel* nonetheless requires that there be a "bona fide" policy justification. As the Fourth Circuit's most recent en banc majority opinion recognized, determining whether a justification is bona fide requires consideration of the purpose of the challenged state action. *See Int'l Refugee Assistance Project v. Trump ("IRAP III")*, 883 F.3d 233, 263-64 (4th Cir. 2018) ("The *Mandel*

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512 U.S. 687, 715 (1994) (O'Connor, J., concurring in the judgment) (alterations in original, internal quotation marks omitted)).

35. The *Mandel* standard has previously been applied only when reviewing an executive officer's decision to deny a visa. *See Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring). As the Ninth Circuit recognized, *Hawai'i I*, 859 F.3d at 769 n.9 (9th Cir. 2017), *Mandel* is applicable only when the challenge is to claimed *misuse* of delegated authority, *Mandel*, 408 U.S. at 770 ("We hold that when the Executive exercises this power . . . *negatively*," "courts will not look behind the exercise of that discretion") (emphasis added), or when there is a constitutional challenge to a visa denial on the basis of congressionally enumerated standards, *id.* at 769-70—not when the challenge is to action *exceeding* delegated authority. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993) (addressing merits of claim that executive order exceeded authority under the INA without applying *Mandel*).

standard, read through the lens of Justice Kennedy's opinion in *Kerry v. Din* . . . accounts for those very rare instances in which a challenger plausibly alleges that a government action runs so contrary to the basic premises of our Constitution as to warrant more probing review."); *see also Int'l Refugee Assistance Project v. Trump ("IRAP II")*, 857 F.3d 554, 590 (4th Cir. 2017); *see also Bona Fide*, Black's Law Dictionary (4th rev. ed. 1968) ("bona fide" reason is given "sincerely," "honestly," and "with good faith."). There were no allegations in *Mandel* that the reason to exclude the communist speaker was not bona fide. Accordingly, that case dealt solely with facial legitimacy. 408 U.S. at 755, 768 n.7 (noting that all communists were subjected to the same provision). And Justice Kennedy's controlling concurrence[36] in *Din* noted that "an affirmative showing of bad faith," when alleged with sufficient particularity, as here, could overcome deference to a governmental decision. 135 S. Ct. at 2141.[37] This approach also comports with more recent applications of *Mandel* and *Din*, where courts have admonished claimants for failing to allege bad faith—comments that would be non sequiturs if no such allegation could overcome deference. *See, e.g., Cardenas v. United States*, 826 F.3d 1164, 1173

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36. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

37. Although *Din* recognized that an affirmative showing of bad faith could nullify an executive action, the facts of that case did not address that question, as there was no allegation of bad faith, and the Court recognized that that Petitioner's admission that he "worked for the Taliban" provided "at least a facial connection to terrorist activity." 135 S. Ct. at 2141.

(9th Cir. 2016) (rejecting claim of racial discrimination because the plaintiff did "not plausibly establish that the decision . . . was made on a forbidden racial basis"); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (explaining that "a well supported allegation of bad faith . . . would render the decision not bona fide").

As described more fully below, the Proclamation clearly discriminates against Muslims. *See* Section C, *infra*. That Petitioners are able to concoct a purportedly bona fide justification for its existence does nothing to change this result. Even assuming the high bar of *Mandel* applies here, the evidence before the Court demonstrates that bar has been met and exceeded.

B. The Immigration and Nationality Act Limits Executive Authority to Engage in Discriminatory Conduct.

The Proclamation, like its predecessors, contravenes the letter and intent of the Immigration and Nationality Act of 1965 (the "INA"), exceeding the scope of presidential authority under that statute. The INA was enacted at the height of the civil rights movement, to dismantle the then-current system of national-origin quotas, which the nation's leaders believed to be "contrary to our basic principles as a nation."[38] The INA's legislative history shows that its intent was to "remove from our law a

38. 111 Cong. Rec. 24,225 (1965) (statement by Senator Edward M. Kennedy). *See also id.* at 21,778 (statement of Representative Paul Krebs that immigration rules based on national origin were "repugnant to our national traditions," and that "we must learn to judge each individual by his own worth and by the value he can bring to our Nation").

discriminatory system of selecting immigrants that is a standing affront to millions of our citizens."[39] Section 202 of the INA effectuates that intent by prohibiting discrimination in admissions on the basis of national origin. *See* 8 U.S.C. § 1152(a)(1)(A) (with limited statutory exceptions, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."); *see, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995) *vacated on other grounds*, 519 U.S. 1 (1996) (Congress, in enacting Section 202, "unambiguously directed that no nationality-based discrimination shall occur").

The President's authority under INA Section 212(f) to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate," *see* 8 U.S.C. § 1182(f), is subject to at least three important limitations. The Proclamation exceeds the scope of the President's authority as to each of these limitations, and is therefore outside the scope of the authority granted by Section 212(f) in at least three ways.[40]

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39. Immigration: Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary, House of Representatives, on H.R. 7700 and 55 Identical Bills, 88th Cong. 901-02 (1964), *as reprinted in* 10A Oscar Trelles & James Bailey, Immigration and Nationality Acts: Legislative Histories and Related Documents, doc. 69A (1979) 410 (remarks of Attorney General Robert Kennedy).

40. In addition, the plain language of Section 212(f)—which confers authority to "suspend" the entry of aliens—does not on its face cover an executive action like the Proclamation, which is effectively permanent, since it is indefinite in duration.

First, any presidential proclamation under Section 212(f) requires a legitimate finding that "the entry of [the suspended] aliens or . . . class of aliens into the United States would be detrimental to the interests of the United States." *Id.* Yet the Proclamation, like its predecessor Executive Orders, makes no attempt to connect the nationality of individuals affected by the Proclamation with any heightened security risk or other detriment to a national interest. *See Hawai'i v. Trump ("Hawai'i II")*, 878 F.3d 662, 693 (9th Cir. 2017) (as amended). At most, the Proclamation seeks to highlight terrorism-related risks in each affected country, such as the "several terrorist groups" that are "active" in Chad. *See id.*; Proclamation § 2(a)(i). Yet the Proclamation fails to take the next step by making a finding as to the *nexus* between the nationals of each country and the asserted terrorist activity. Under the INA, the failure to draw this connection is fatal to the Proclamation's validity. *Hawai'i II*, 878 F.3d at 693.

Second, Section 212(f) is circumscribed by Section 202's express and later-enacted prohibition against discrimination on the basis of national origin.[41] The Proclamation plainly violates that prohibition, as it "restrict[s] and limit[s] the entry of *nationals of 7*

41. When there is a conflict between two provisions of a statute, the provisions should, whenever possible, be construed to give effect to both provisions. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must "fit, if possible, all parts into an harmonious whole") (citations omitted).

countries . . .: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen" without further nuance.[42]

Third, the Constitution itself limits the President's Section 212(f) authority. Section 212(f) is a limited delegation of Congress's power to make immigration laws. *See generally* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (the formulation of immigration policies is "entrusted exclusively to Congress"). Since the President's authority is derived from Congressional authority, Section 212(f)'s delegation of authority—like Congress's power itself—is necessarily circumscribed by the Constitution.[43] *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (Congress's power to create immigration law is "subject to important constitutional limitations"); *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (the Court declined to find in the Secretary of State's facially unlimited authority to set rules governing the grant and issuance of passports an "authority" that would "trench . . . heavily" on fundamental rights, overturning the Secretary's denial of two passport applications as ultra vires); *United States v. Witkovich*, 353 U.S. 194, 199 (1957) (the facially unlimited power of the Attorney General to obtain, *inter alia*, any information from any alien subject to a final order of deportation was implicitly limited to certain relevant topics, where the broad reading proposed by the government would call into question the statute's constitutionality, and the context and legislative history of the statute did not provide

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42. Proclamation § 1(h)(ii) (emphasis added).

43. Section 202's prohibition of discrimination on the basis of national origin further limits Congress's delegation of authority to the President in INA Section 215(a)(1). *See* 8 U.S.C. § 1185(a)(1).

unambiguous evidence that Congress intended to give the Attorney General unbridled authority). Because, as the Proclamation demonstrates, actions taken pursuant to an overbroad construction of Section 1182(f) authority can encroach on core constitutional values, presidential authority under INA Section 212(f) is necessarily subject to implicit constitutional limitations, in addition to the explicit limitations in Section 212(f) itself and in Section 202.[44]

As shown below, the Proclamation exceeds the bounds of Presidential authority under INA Section 212(f) not only by violating Section 202's unambiguous prohibition against discrimination on the basis of national origin, and INA Section 212(f)'s own requirement that an exercise of presidential authority under that section be justified by a legitimate finding that the admission of a suspended class of individuals is against the interests of the United States, as described above, but also by violating the Constitution.

C. The Proclamation's Context and History Reveal that the Proclamation Violates the Constitution and the INA.

The Proclamation violates both the Constitution and the INA because it arbitrarily singles out six Muslim-

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44. In fact, the balance of Section 212—particularly the definition of "[c]lasses of aliens ineligible for visas or admission" in subsection (a)(1–10), including on the basis of "prepar[ation] or plan[ning of] a terrorist activity," engagement in activities that would have "potentially serious adverse foreign policy consequences for the United States," or "[a]ssociation with terrorist organizations"—further suggests that Congress did *not* intend for the President to be able to use his Section 212(f) authority to discriminate on the basis of national origin, even in the purported or actual name of national security. *See* 8 U.S.C. § 1182.

majority countries as targets for its ban. This invidious discrimination is apparent from the context and history of the Proclamation and the unsubstantiated pretext offered to support it.

The Proclamation's indefinite suspension of entry by nationals of specified countries discriminates against Muslims on the basis of their religion because it singles out these Muslim-majority countries without a plausible basis for doing so. Petitioners' denial that the Proclamation is a Muslim ban is belied by the President's own repeated characterization of the ban as well as by its impact, the lion's share of which will fall on the nationals of the five targeted countries with a majority Muslim population of 90% or more.[45] Three of those countries—Iran, Somalia, and Yemen—have Muslim populations of more than 99%.[46]

The addition of two non-Muslim majority countries—Venezuela and North Korea—does not cure the clear discrimination. As the Fourth Circuit recognized, the Proclamation affects "very few persons from those countries as opposed to the many tens of thousands from the other Muslim-majority countries . . . ." *IRAP III*, 883 F.3d at 268 (as amended Feb. 28. 2018). Indeed, based on data from 2016 visa issuances, the Proclamation would have excluded only nine North Koreans, and no Venezuelans.[47] This is little more than a thinly veiled

45. Pew Research Ctr., "The Global Religious Landscape: a Report on the Size and Distribution of the World's Major Religions as of 2010," 47-50 (2012), https://goo.gl/HVoVJ1 (Libya is 96.6% Muslim and Syria 92.8%).

46. *Id.*

47. Kathryn Casteel & Andrea Jones-Rooy, *Trump's Latest Travel Order Still Looks a Lot Like a Muslim Ban,*

attempt to camouflage the "unmistakable" religious objective originally embedded in the predecessor Orders, in order to improve the Government's "litigating position," rather than a legitimate effort to achieve any purported security objective. *See McCreary*, 545 U.S. at 871-72 (finding that the addition of purportedly neutral statements to Ten Commandments display was a transparent and unsuccessful attempt to distinguish it from the two previously enjoined Ten Commandments displays).

The Proclamation's unconstitutional and illegal invidious discrimination is made apparent by a review of its history, including statements made by the President and others regarding its purposes. As the Fourth Circuit found when it held that the Proclamation violated the Establishment Clause, evidence of discriminatory bias:

> includes President Trump's disparaging comments and tweets regarding Muslims; his repeated proposals to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this 'Muslim' ban by targeting 'territories' instead of Muslims directly; the issuance of EO-1 and EO-2, addressed only to majority-Muslim nations; and finally the issuance of the Proclamation, which not only closely tracks EO-1 and EO-2, but which President Trump and his advisors described as having the same goal as EO-1 and EO-2.

FiveThirtyEight (Sept. 28, 2017), https://fivethirtyeight.com/features/trumps-latest-travel-order-still-looks-a-lot-like-a-muslim-ban/.

IRAP III, 883 F.3d at 264. Most recently, a mere nine days before the Proclamation was issued, the President tweeted: "[t]he travel ban into the United States should be far larger, tougher and more specific-but stupidly, that would not be politically correct!"[48]

The Proclamation, like the Executive Orders that preceded it,[49] cannot escape the extensive history of the President's discriminatory statements. Indeed, the Proclamation recites in its first three words—and repeatedly throughout—that it is in fact based on the findings of the immediately prior Order. *See, e.g.*, Proclamation §§ 1(c), 1(f), 1(h), 1(i), 4(c), 6(d), 7(a)(i). The Proclamation thus links itself to the countless statements of the President that, without any evidence whatsoever, perpetuated the stereotype that people of Muslim faith are largely terrorists seeking to harm the United States.[50]

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48. *See, e.g.*, Donald J. Trump, Twitter (Aug. 18, 2017), https://twitter.com/realdonaldtrump/status/908645126146265090.

49. *See, e.g.*, *Washington*, 847 F.3d at 1167 ("statements by the President about his intent to implement a 'Muslim ban'" and evidence that the original Executive Order represented the effectuation of that intent undermined the Government's likelihood of success on appeal of injunction of the original Executive Order).

50. *See, e.g.*, Jessica Estepa, *'Preventing Muslim immigration' statement disappears from Trump's campaign site*, USA Today (May 8, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780/ (campaign website calling for a "shutdown of Muslims entering the United States" taken down May 8, 2017); Interview of Donald Trump on CBN News, YouTube (Apr. 11, 2011), https://m.youtube.com/watch?v=fWzDAvemJG8 (arguing that there is a "Muslim problem" in the United States, and suggesting that the Koran teaches a "very negative vibe" and "tremendous hatred").

President Trump has repeatedly called for: shutting down mosques in the United States,[51] suspicionless surveillance of Muslims in mosques,[52] a registry for all practicing Muslims,[53] racial profiling of all Muslims,[54] and a total ban of Muslims coming to the United States.[55]

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51. *See, e.g.*, Nick Gass, *Trump: 'Absolutely no choice' but to close mosques*, Politico (Nov. 18, 2015), http://www.politico.com/story/2015/11/trump-close-mosques-216008.

52. *See, e.g.*, Lauren Carroll, *In Context: Donald Trump's comments on a database of American Muslims*, Politifact (Nov. 24, 2015), http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/.

53. Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC News (Nov. 20, 2015), http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716. On December 21, 2016, more than a month after being elected President, Mr. Trump responded to a question about whether he was rethinking his plan for a Muslim registry by stating: "You know my plans all along, and I've been proven to be right." Video, Trump: *'You' ve known my plans' on proposed Muslim ban*, Wash. Post (Dec. 21, 2016), https://www.washingtonpost.com/video/politics/trump-youve-known-my-plans-on-proposed-muslim-ban/2016/12/21/8a7bba66-c7ba-11e6-acda-59924caa2450_video.html.

54. Transcript, Face the Nation, CBS News (Jun. 19, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/.

55. Ed Pilkington, *Donald Trump: Ban All Muslims Entering US*, The Guardian (Dec. 7, 2015), https://www.theguardian.com/us-news/2015/dec/07/donald-trump-ban-all-muslims-entering-us-san-bernardino-shooting. Petitioners' assertion that these comments like these are a product of a candidate running for office rather than a President who took an oath to uphold the constitution is belied by the fact that these comments have continued as recently as August, 2017. *See, e.g.*,

The administration has attempted to cloak this discriminatory intent in neutral language, but to no avail. In July 2016, then-candidate Trump telegraphed his aim to disguise the language of the Muslim ban to pass legal muster, when he noted that he would henceforth refer to the Muslim countries on the basis of geographic location rather than religious majority, because "[p]eople were so upset when [he] used the word Muslim."[56] Rather than a "rollback" of previous calls for a Muslim ban, President Trump has characterized the Administration's new approach as an "expansion" of his prior rhetoric.[57] A prominent advisor to the Trump campaign, Rudolph W. Giuliani recounted that President Trump wanted a "Muslim ban" and had requested that Mr. Giuliani assemble a commission to show him "the right way to do it legally."[58] Since then, the President has affirmed, and in fact doubled down on the same rhetoric, repeatedly characterizing the prior Executive Order as a ban—not a temporary pause, as Petitioners assert:

Donald J. Trump, Twitter (Aug. 18, 2017), https://twitter.com/realDonaldTrump/status/898531481185689600 ("Radical Islamic Terrorism must be stopped by whatever means necessary!"); *see also infra* at 20-21.

56. Donald Trump Remarks in Manchester, New Hampshire, C-SPAN (Jun. 13, 2016), https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats.

57. *Id.*

58. *Trump asked for a Muslim Ban Giuliani says – and ordered a commission to do it 'legally,'* Wash. Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a- muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it- legally/?utm_term=.82e451dca6b8.

- On April 26, 2017, the President stated, "the Ninth Circuit rules against the ban . . . ridiculous."[59]

- On June 3, 2017, the President stated, "We need the Travel Ban as an extra level of safety!"[60]

- On June 5, 2017, the President stated, "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[61] The President then reiterated this point not once, but twice in the same day. He stated, "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."[62] Less than three hours later, he stated, "we need a TRAVEL BAN . . . not some politically correct term that won't help us protect our people."[63]

- On June 13, 2017, the President stated, "the 9th Circuit did it again - Ruled against the TRAVEL BAN."[64]

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59. Donald J. Trump, Twitter (April 26, 2017), https://twitter.com/realDonaldTrump/status/857177434210304001.

60. Donald J. Trump, Twitter (June 3, 2017), https://twitter.com/realDonaldTrump/status/871143765473406976.

61. Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871674214356484096.

62. Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128.

63. Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871899511525961728.

64. Donald J. Trump, Twitter (June 13, 2017), https://twitter.com/realDonaldTrump/status/874578159676665857.

- On August 17, 2017, the President again promoted the same anti-Muslim propaganda repeated throughout the campaign that General Pershing was able to eradicate terrorism by murdering captured Muslims with bullets soaked in pigs' blood: "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"[65]

Plainer evidence of animus against Muslims would be difficult to find. *See Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest.").[66]

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65. Donald J. Trump, Twitter (Aug. 17, 2017), https://twitter.com/realDonaldTrump/status/898254409511129088.

66. Even if this was not the purpose, the indisputable perception of sect favoritism violates the Establishment Clause. *See McCreary*, 545 U.S. at 883 (O'Connor, J., concurring) (finding violation of Establishment Clause because of "unmistakable message of endorsement to the reasonable observer"); *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'") (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). And the public perception of the original Executive Order is clear: it is a Muslim ban. *See* Public Policy Polling, *After 2 Weeks, Voters Yearn For Obama* 1, 4 (Feb. 2, 2017) (finding in poll conducted on January 30-31, 2017 that "52% of voters think that the order was intended to be a Muslim ban, to only 41% who don't think that was the intent"), https://goo.gl/1L5psC. *See also CNN/*

The Administration's proffered interest in securing our borders is also merely pretextual, as the Proclamation is both under and over-inclusive. A statute or rule that is under and over-inclusive in burdening a constitutionally protected interest is not narrowly tailored to achieve a compelling state interest, as required to satisfy the Establishment and Equal Protection Clauses. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Here, although the Proclamation relied on findings derived from the previous Executive Order, the totality of those findings were not shared with the public, so "a reasonable observer [has] no basis to rely" on that review. *IRAP III*, 883 F.3d at 268. And reviewing the Proclamation's stated interests without the context of any other findings reveals a cavernous and unbridged gap between those interests and the selection of the targeted countries.

The disconnect between the Proclamation's stated purpose to "protect the security interests of the United States and its people" (Proclamation Preamble), and its means of achieving that goal results in overbreadth. The targeted countries were identified in part because they contained "significant terrorist presence." *Id.* But the Proclamation, as discussed *supra* in Part III.B, fails to make any finding that connects nationality with any such terrorist presence or activity. For example, the Proclamation admits that Somalia "generally satisfies the information-sharing requirements" but nonetheless

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ORC Int'l Poll 9 (Feb. 3, 2017) (55% think the Executive Order that preceded the Proclamation "is a ban on Muslims"), https://goo.gl/0xE98B. Although public polling regarding the new ban has not been conducted, "reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which the [policy] arose." *McCreary*, 545 at 866 (internal citation omitted).

subjects that Muslim-majority country to travel restrictions based on amorphous findings that terrorists "conduct their operations" in certain regions of Somalia and that Somalia is a "destination" for individuals attempting to join terrorist groups. Proclamation §§ 1(i), 2. These "findings" illustrate the overbreadth of Proclamation's travel ban on Somalian nationals: individuals traveling *to* Somalia as part of an effort to join a terrorist group are unlikely to be Somalian nationals, and banning all Somalian nationals due to the presence of terrorist operation in certain *regions* in Somalia is similarly overbroad. The ban articulated in the Proclamation is wildly over-inclusive and therefore unconstitutional. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (law failed rational basis review where "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects").

The Proclamation is also dramatically under-inclusive.[67] Despite the proffered interest in security,

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67. One of the criteria purportedly used by the Government in evaluating countries for inclusion in the Proclamation—"whether [a country] regularly fails to receive its nationals subject to final orders of removal from the United States," *see* Proclamation § 1(c)(iii)—is the subject of a list maintained by the U.S. Department of Homeland Security that includes at least eleven countries that are not covered by the Proclamation. *See* Alan Neuhauser, *DHS Seeks Sanctions on Countries that Refuse Deportees*, U.S. News (Aug. 23, 2017), https://www.usnews.com/news/national-news/articles/2017-08-23/dhs-seeks-sanctions-on-countries-that-refuse-to-accept-deportees (Twelve "recalcitrant countries" identified by DHS include Burma, Cambodia, China, Cuba, Eritrea, Guinea, Hong Kong, Iran, Laos, Morocco, South Sudan, and Vietnam,); *see also* Maria Sacchetti, *Like Obama before him, Trump struggles to deport some foreign-born criminals*, The Washington Post (Apr. 8, 2017), https://www.washingtonpost.

the Proclamation does not include on its list of affected countries any of the home countries of the perpetrators of the September 11, 2001 attacks.[68] And Saudi Arabia, a country that President Trump has previously written is the "biggest funder of terrorism," is not on that list.[69] Nor does it include countries connected to the perpetrators of more recent domestic attacks in San Bernardino, New Jersey, New York, Orlando or Boston.[70] Tellingly, the Proclamation does not include any of the majority-Christian nations that are listed by the State Department as "terrorist safe havens."[71] *See Larson*, 456 U.S. at 244 ("[T]his Court has adhered to the principle, clearly

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com/local/social-issues/like-obama-before-him-trump-is-freeing-foreign-born-criminals/2017/04/06/d9776a3c-149c-11e7-ada0-1489b735b3a3_story.html; ***DHS Announces Implementation of Visa Sanctions on Four Countries***, U.S. Dep't of Homeland Security, https://www.dhs.gov/news/2017/09/13/dhs-announces-implementation-visa-sanctions-four-countries (Sept. 13, 2017) (announcing sanctions against Cambodia, Eritrea, Guinea, and Sierra Leone for failing to accept removed nationals two weeks before the issuance of the Proclamation).

68. Pamela Engel, ***Trump's immigration ban doesn't include the country most of the 9/11 hijackers came from***, Business Insider (Jan. 30, 2017), http://www.businessinsider.com/trumps-muslim-ban-saudi-arabia-911-2017-1 ("[T]he [initial] executive order doesn't apply to ***any*** of the countries where the 9/11 attackers were from.") (emphasis in original).

69. Donald J. Trump, ***Time to Get Tough: Make America Great Again!***, Regnery Publishing, Inc., 20 (2011).

70. Eric Levenson, ***How many fatal terror attacks have refugees carried out in the US? None***, CNN (Jan. 29, 2017), http://www.cnn.com/2017/01/29/us/refugee-terrorism-trnd.

71. Chapter 5: Terrorist Safe Havens (Update to 7120 Report), U.S. Dept. of State, https://www.state.gov/j/ct/rls/crt/2015/257522.htm.

manifested in the history and logic of the Establishment Clause, that no State can pass laws which aid one religion or that prefer one religion over another.") (internal citation and quotation marks omitted). That the Proclamation so clearly picks and chooses among countries whose residents could threaten the United States reveals that the administration's proffered interest is a pretext for discrimination against people of the Muslim faith, and is therefore invalid. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 543 (1993).

CONCLUSION

For the foregoing reasons, the Proclamation exceeds the scope of presidential authority under the INA and violates the Constitution. This Court should therefore affirm the decision below to enjoin implementation of the Proclamation.

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